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A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

ORIGINAL
FILE

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JUN 12 1992

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June 12, 1992 Federal Communications Commission
Office of the Secretary

Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Comments of Santarelli, Smith & Carroccio
In the Matter of Review of the Commission's
Regulations and Policies Affecting Investment
in the Broadcast Industry
FCC 92-96

Dear Ms. Searcy:

Transmitted herewith for filing, on behalf of the law firm of Santarelli, Smith & Carroccio, are an original and four (4) copies of its "Comments" on in the Commission's above captioned proceeding, FCC 92-96. Also transmitted herewith are five (5) additional copies of the pleading, which copies are for distribution to each of the Commissioners.

Should there be any questions regarding this matter, please communicate with the undersigned member of this firm.

Sincerely,

SANTARELLI, SMITH & CARROCCIO

By: 

A. Thomas Carroccio

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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Review of the Commission's) MM Docket No. 92-51
Regulations and Policies)
Affecting Investment)
In the Broadcast Industry)

COMMENTS OF
SANTARELLI, SMITH & CARROCCIO

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Its Attorneys

June 12, 1992

Before the
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Federal Communications Commission
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COMMENTS OF
SANTARELLI, SMITH & CARROCCIO

The law firm of Santarelli, Smith & Carroccio ("Firm"), hereby submits comments in response to the "Notice of Proposed Rule Making and Notice of Inquiry" ("NPRM") initiating this proceeding.^{1/} For its comments, the Firm states as follows:

Background

1. As acknowledged by the NPRM, the Firm is a participant in the pending declaratory ruling proceedings regarding reversionary and security interests in broadcast licenses.^{2/} The purpose of the instant comments is to address certain issues newly raised in the NPRM, and to respond to specific questions set forth by the Commission.^{3/}

^{1/} Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, FCC 92-96, released April 1, 1992.

^{2/} Id., at Appendix A. The Firm's comments ("Firm's Comments") and the Firm's reply comments ("Firm's Reply") in those proceedings are incorporated herein by reference.

^{3/} Id., at ¶ 23.

Attribution of Ownership

2. The Firm supports the Commission's proposals to raise the benchmarks for both "passive" and passive institutional investors. It also supports the proposal to expand the class of investors eligible to utilize the higher attribution benchmark for passive institutional investors. The Firm has found that passive investment in the broadcast industry is restricted to a relatively limited number of individual and institutional investors. It also has found that, while such investors are willing to substantially expand their broadcast investment activity, their ability to do so is limited more by the Commission's multiple ownership and ownership attribution rules than by the financial resources available to these investors. The Firm suggests that the proposed raising of the attribution benchmarks will immediately result in the infusion of additional capital from present passive investors.

3. The Commission also could provide an incentive for broadcast lending by applying the benchmarks for passive institutional investors to interests in broadcast licenses obtained in connection with loans to broadcasters. The Firm believes that many potential lenders could be induced to extend financing to the broadcast industry if they were able to increase the return on their loans through equity participation arrangements such as warrants. One present obstacle to the use of such arrangements is that any interest obtained upon the exercise of loan-related warrants are attributable interests. By allowing such interests to be treated according to the benchmark for interests held by passive

institutional investors, the Commission can induce increased participation in broadcast lending.

Security Interests in Broadcast Licenses

4. When addressing the statutory considerations surrounding the issue of security interests in broadcast licenses, the Commission noted, inter alia, the divergent positions taken by various bankruptcy courts with regard to such security interests.^{4/} The Firm submits that the Commission should be concerned with the rulings of the bankruptcy courts, because those rulings, in the absence of a clear and decisive Commission ruling on security interests, are dominating the investment and lending decisions affecting the industry. Unless the Commission asserts its primacy in this area, broadcast transactions will be impeded or impaired by the uncertainty arising out of the conflicting bankruptcy court rulings. Accordingly, the Commission must issue a definitive ruling on this matter in an expeditious fashion.

5. In calling for comments on the issue of reversionary and security interests in broadcast licenses, the Commission specifically invited comments on the statutory considerations affecting such interests. As pointed out in the Firm's Comments, the prohibition on security interests in broadcast authorizations arose out of an earlier Commission policy against reversionary interests. The concern with reversionary interests has always been their potential for usurpation of the Commission's sole authority

^{4/} Id., at ¶¶ 21-22.

to approve assignments or transfers of control, of radio licenses. Somehow, that concern has been converted into a belief that the Communications Act prohibits "property interests" in radio licenses. As pointed out in the Firm's Comments, there is no statutory prohibition against property interests in licenses, and, therefore, there is no basis for the conclusion that the prohibitions on reversionary or security interests are statutorily based. Accordingly, the Commission is under no statutory restriction on these issues, and is free to conclude that its policies against reversionary and security interests should not be continued from here on out.

6. The Commission set forth five policy concerns it would weigh in deciding whether to rescind its policies against reversionary and security interests in broadcast licenses.^{5/} Those concerns are addressed seriatim below.

7. Increased Capital Availability. Broadcast loans are subject to a negative consideration not present in any other industry; the inability to obtain a direct security interest in the single most valuable and important asset of the borrower. The Firm has had several experiences where a prospective lender to a broadcaster refused to further consider the extension of a loan upon learning of the prohibition against security interests in broadcast licenses. Today, the broadcast industry is forced to rely upon an extremely limited number of financial institutions, each of which has developed an expertise in broadcast lending. It

^{5/} Id., at ¶ 23.

is extremely rare to for a broadcaster to obtain financing from a local financial institution or another source not regularly involved in broadcast lending. The Firm believes the removal of the prohibition against security interests in broadcast licenses would allow broadcast loans to be evaluated in a manner comparable to other business loans, and thereby vastly expand the pool of financial institutions willing to lend to the broadcast industry.

8. It is respectfully submitted that the rescission of the prohibition on security interests will have little, if any, impact on relationships between broadcasters and their general creditors. Even under today's regulatory scheme, all creditors recognize that their relationships are subject to various established priorities under general commercial law. Lenders already obtain security interests in the major "hard" assets of broadcast stations, without which assets the stations are rendered inoperable. In many cases where the size of the lending transaction warrants, broadcasters and their lenders utilize single purpose corporations to hold licenses out of the reach of general creditors. These mechanisms already provide some degree of preference to broadcast lenders, and that preference has not chilled broadcasters' relationships with other creditors. The main change to the relationship between secured and unsecured creditors resulting from a rescission of the prohibition on security interests would be to place the priorities of the various parties clearly on the public record. Such openness could only serve to benefit all creditors and prospective creditors

by providing them with the full information to make a reasoned business decision.

9. Broadcaster Independence. Security interests in broadcast licenses should not affect the independence of broadcasters. In fact, such security interests would allow secured creditors to reduce their monitoring of station performance because they would be secure in their ability to recover the value of their loans from the secured assets. Also, by allowing creditors to shift their repayment reliance from a broadcast principal's personal guarantee to a security interest in his broadcast license, there will be less direct pressure on the decisions of that principal. The Firm submits that the use of security interests will allow both creditor and debtor greater freedom in their relationship.

10. Transfers of Control. The surest safeguard against an unauthorized transfer of control in any situation, including one involving a security interest in a broadcast license, is the availability of a clear regulatory mechanism for prompt resolution of foreclosure-type proceedings. The Commission has long provided such a mechanism through its "short form" assignment and transfer of control approval process. It is suggested that if the Commission believes it necessary to assure compliance with Section 310(d) of the Act, it only need confirm to broadcasters and their creditors that this process will continue to be available to them.

11. The Firm also proposes that the Commission allow a broadcaster and his creditor to designate a trustee, or other

fiduciary, when establishing a security interest in a broadcast license. Such trustee, like a trustee under a real estate deed of trust, should be empowered to seek Commission consent, through the "short form" process, to preserve a broadcaster's assets and dispose of them in an orderly and expeditious manner in the event of the need to foreclose upon a security interest. Because a trustee's control over a station would be temporary and for a limited purpose, any trustee should not be subject to the Commission's rules on multiple ownership. Of course, the Commission would reserve the ability to intervene in any situation where it found a trustee relationship was contrary to the public interest. If the Commission indicates its approval of trustee arrangements, the Firm would anticipate the emergence of a cadre of professional trustees upon whom both broadcasters and lenders could rely for the fair and efficient resolution of foreclosure proceedings. Even in the absence of such beneficial arrangements, however, the Firm believes there are sufficient safeguards and procedures already in place to prevent either broadcasters or their creditors from engaging in unauthorized transfers of control in connection with security interests in broadcast licenses.

12. Creditor Forbearance. Rather than discouraging lenders from helping broadcasters work out of temporary financial difficulties, the presence of security interests in broadcast licenses will allow those lenders to forbear from precipitous action against the broadcaster. Most lender actions against borrowers are compelled by a perceived need to preserve sufficient

assets for the payment of the loan. As long as the lender is assured that the principal asset of the broadcaster remains available to satisfy its loan, it need not take any draconian measures against the broadcaster while he works with other creditors in an attempt to resolve any temporary financial reversals. For this reason, a security interest in a broadcast license will invariably afford a broadcast borrower additional freedom and time to work out of financial difficulties.

13. Existing Contracts. All creditor-debtor relationships are subject to the interaction of competing claims against the assets of the debtor. Current laws governing these relationships and the priorities of various creditor's claims will prevent existing contractual relationships from being disrupted by any Commission action regarding security interests in broadcast licenses. Future creditor relationships will be undertaken in reliance upon then-extant considerations, including Commission policy on security interests. The transition to a new regulatory environment will not displace any existing creditor from its present lawful position.

Other Financing Mechanisms

14. The Firm does not believe broadcast loans are reasonably subject to "pooling" for several reasons. First, the terms of such loans cannot be adequately standardized to permit their assembly into a definable package for "securitization". Second, there are not sufficient broadcast loans outstanding at any given time to

provide a valid actuarial basis to predict the performance (e.g., default rate or prepayment rate) of a package of such loans.

15. The Firm recommends that, instead of attempting to seek a mechanism for pooling of broadcast loans, the Commission should assure the liquidity of the broadcast lending markets by providing sufficient security, in the form of security interests in broadcast licenses, to enable broadcast loans to be freely transferable in a secondary market.

Respectfully submitted,

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